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IN THE

Supreme Court of the United States

October Term, 1957.

No. 63.

BOARD OF PUBLIC EDUCATION,
SCHOOL DISTRICT OF PHILADELPHIA

v.

HERMAN A. BEILAN,

Petitioner.

Brief for Respondent.

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BOARD OF PUBLIC EDUCATION,
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HERMAN A. BEILAN,

Petitioner.

BRIEF FOR RESPONDENT.

JURISDICTION.

Petitioner has invoked the jurisdiction of this Court under Title 28 U. S. C., Section 1257(3). Respondent submits that no question under the Constitution or laws of the United States is raised by the dismissal of a public school teacher on the statutory ground of "incompetency" under the teachers' tenure laws of Pennsylvania, where the charge of incompetency was based upon the teacher's refusal to answer proper questions of his Superintendent in a professional interview. The decision of the Pennsylvania Supreme Court was based on adequate non-federal grounds. There is no substantial federal question for this Court.

QUESTION PRESENTED.

Does it violate the due process provision of the Fourteenth Amendment for a State to dismiss a public school teacher on the ground that his refusal to answer questions asked by his Superintendent as to his past activity in subversive organizations constituted incompetency within the meaning of a State statute?

STATEMENT OF THE CASE.

This is a proceeding dismissing a public school teacher under the tenure provisions of the Public School Code of the Commonwealth of Pennsylvania, Act of March 10, 1949, P. L. 30, § 1122 et seq., as amended, 24 Purdon's Pa. Stat. Ann. §§ 11-1122 et seq.

The ground for dismissal, as sustained by the Supreme Court of Pennsylvania, was incompetency, consisting of the refusal of petitioner to answer questions of the Superintendent of Schools in a professional interview, relating to whether petitioner had been a member of subversive organizations. This charge was sustained by the Board of Public Education after due notice and after a hearing which was attended by petitioner and his counsel.

There was an additional charge against petitioner based on a refusal to answer questions concerning his alleged Communist affiliations before a Congressional Committee, and this charge was also sustained by the Board of Public Education. This charge is *not* before the Court on this *certiorari*, as the Supreme Court of Pennsylvania sustained petitioner's dismissal on the basis of his refusal to answer the Superintendent's question, and found it unnecessary to consider whether the other charge was also sustained (R. 124).

At the written request of the Superintendent of Schools, petitioner reported to the Superintendent's office

for an interview on June 25, 1952. At this conference the Superintendent stated that he had received information which, if true, reflected adversely on petitioner, and that he wished to discuss this information to determine whether it was true (R. 19a). Petitioner suggested that the Superintendent ask the questions. The Superintendent said that there were a number of questions and that he wanted the answer to each question before asking the next one. He then asked whether petitioner was Press Director of the Professional Section of the Communist Political Association in 1944. Petitioner requested that he be permitted to consult counsel and the Superintendent agreed to this request.

A second conference took place in the Superintendent's office on October 14, 1952, at the Superintendent's written request. Petitioner stated that he had consulted counsel and that he would not answer either the question about his Communist activities in 1944 or any questions of a similar character (R. 22a).

The Superintendent explained that this was a very serious and important matter and that failure to answer might lead to dismissal (R. 22a). Petitioner persisted in his refusal to answer questions.

The Board of Public Education conducted a formal hearing on the charges of incompetency, as required by Section 1127 of the Pennsylvania Public School Code of 1949, P. L. 30 (24 Purdon's Pa. Stat. Ann. § 11-1127).

Petitioner was present and was represented by counsel, who participated actively in the hearing, which was private at the request of petitioner. He was afforded opportunity to offer evidence. Petitioner did not testify on his own behalf at the hearing before the Board.

The Board of Public Education found that the charges of incompetency were sustained and petitioner was dismissed by a 14-to-1 vote of the Board (R. 75a). On petitioner's appeal to the Superintendent of Public Instruction of the Commonwealth, the State Superintendent sustained

the action of the Philadelphia Board of Public Education (R. 76a-80a).

The petitioner then appealed to the Court of Common Pleas, where his appeal was heard on the record before the Board, and no further testimony was offered by the petitioner, although under the School Code he had the right to present additional evidence if he so desired. That Court reversed the order of the Superintendent of Public Instruction and set aside the dismissal (R. 104a-112a).

On appeal the Supreme Court of Pennsylvania reversed the order of the lower court and sustained the dismissal (R. 115-127). The Supreme Court denied the petition for reargument (R. 145).

This Court granted certiorari, 353 U. S. (Adv.) 964 (1957).

SUMMARY OF ARGUMENT.

The State has the power to dismiss a public school teacher who refuses to answer pertinent questions of the School Superintendent, relating to the teacher's former affiliation and activity in Communist causes.

Such an inquiry into former Communist activity of a teacher is clearly within the authority, and indeed the duty, of the School Superintendent, as it is relevant to the teacher's present fitness to teach. The position of a public school teacher is a sensitive one. An employee's past conduct and associations are relevant to a determination of his present fitness for such a position of trust.

Garner v. Board of Public Works of Los Angeles, 341 U. S. 716 (1951).

Dismissal on the ground of incompetency, a specified cause for dismissal under the State statute, as interpreted by the State Supreme Court, does not violate the federal Constitution. Under the State law, as interpreted by prior decisions, incompetency is a broad term, not limited to classroom proficiency and learning, and includes the lack of qualifications and fitness. The Supreme Court of Pennsylvania held in this case that a teacher who refuses to respond to a pertinent inquiry relating to his fitness to teach is not competent, whether the inquiry concerns loyalty or any other proper subject of inquiry. Such an interpretation of the statute by the State Supreme Court is purely a question of State law. It is not an arbitrary interpretation and does not infringe any constitutional right of the teacher.

The dismissal of the teacher for incompetency in refusing to respond to such a proper inquiry is not a dismissal for past or present disloyalty, either actual or suspected. The petitioner was dismissed for incompetency as the record clearly shows. The State Supreme Court properly determined that the procedure employed

dismissal of the petitioner was correctly based on the tenure provisions of the Public School Code. The Pennsylvania Loyalty Act was not involved. Such determination was an interpretation of the State law, and does not infringe any provision of the federal Constitution.

No inference of disloyalty of the petitioner was drawn by the Board of Public Education. The purpose of the Superintendent's inquiry into past activity of the teacher was to help to determine the teacher's present fitness. Accordingly the question of whether such past activities of the teacher were lawful or unlawful or whether they would have disqualified him for continued employment; if they had been determined to exist, is irrelevant.

The petitioner had adequate notice that an answer to the question was required of him. Not only must he be presumed to know his duty to his superior to co-operate in a proper inquiry, but also he was expressly notified that his refusal to answer might lead to dismissal, and he persisted in his refusal.

The petitioner was accorded a full hearing before the Board of Public Education, on written charges in accordance with the provisions of the Pennsylvania Public School Code. He had adequate notice. He attended the hearing with his counsel, with full opportunity for cross-examination and presentation of evidence. He had the right of appeal and has availed himself of it. Petitioner has been accorded due process of law in every step of these proceedings.

It is submitted that the power of a State to determine the qualifications of public school teachers under its own tenure laws requires that the exercise of this power in dismissing the petitioner should be upheld. Such action infringes no constitutional right of the individual.

ARGUMENT.

I.

The State Has the Constitutional Right to Dismiss a Public School Teacher Who Refuses to Disclose His Past Communist Affiliations.

The Supreme Court of Pennsylvania held that the conduct of petitioner constituted incompetency within the meaning of the Public School Code of Pennsylvania, Act of 1949, P. L. 30 § 1122, 24 Purdon's Pa. Stat. Ann. § 11-1122, when he refused to answer any question of the Superintendent of Schools relating to past Communist affiliations.

It is conceded by petitioner that present Communist affiliations on the part of a public school teacher are proper grounds for his dismissal. The existence of such influences in the schools is a matter of vital concern. There is, therefore, a right and a duty on the part of school officials to make pertinent inquiry as to whether such affiliations do exist. *This does not mean that the refusal of the petitioner to answer questions would have justified his dismissal for subversion. It means only that it was a subject of legitimate inquiry* as to whether petitioner had such affiliations in the past, and if he had, what effect, if any, they had on his present fitness.

The petitioner contends that the inquiry of the Superintendent was unauthorized, because it related to activities prior to the date when the teacher was required by state law to take a loyalty oath. The only significance of the fact that the specific question which petitioner refused to answer related to a past activity is that an affirmative answer to such question would not have constituted ground for dismissal any more than a negative answer would have. We have not contended that a teacher could be dismissed who had once been a Communist, but had sincerely

ceased to be so affiliated and had taken the required loyalty oath in good faith.[1]

The result of an affirmative answer to the questions about past subversive affiliations would have been that further questions would have been asked, as to whether such activity had ceased, and if so, when and under what conditions. This is simply the normal course of proper inquiry. Because of the importance to the educational system of assuring that teachers are loyal and fit to teach, and because of the possibility that subversive affiliations once established may continue, the Superintendent had the duty to inquire whether the subversive association had existed.

It was held in *Garner v. Board of Public Works of Los Angeles*, 341 U. S. 716 (1951), that the public employer has the right to require the employee to disclose past Communist membership. It was so held even though such past membership was not in itself a ground for dismissal.

In the *Garner* case the Los Angeles city ordinance required every city employee (1) to take a loyalty oath and (2) to execute an affidavit stating whether or not he was ever a member of the Communist Party or the Communist Political Association, and if he ever was such a member, the dates when he became, and the periods during which he was, such a member.

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1. Petitioner overstates the proposition, however, when he contends that Communist activity and membership in 1944 was purely a lawful political association. Depending upon a teacher's knowledge of the purposes of his membership, they may not have been. As long ago as 1941, the Superior Court of Pennsylvania took judicial notice of the conspiratorial and disloyal character of the Communist Party and held that Communist membership was ground for dismissal of a civil service employee even before the enactment of a specific statute providing that advocacy of subversive doctrines was ground for dismissal under the civil service law, because the power to dismiss Communists from public service existed prior to the explicit statute and need not rest on express legislative grant. *Powell v. Unemployment Compensation Board of Review*, 146 Pa. Super. 147, 22 A. 2d 43 (1941).

The employees in the *Garner* case had been dismissed for refusal to take the oath and, in two instances, for refusal to make the affidavit only. The Court considered the oath and the affidavit separately, and upheld the validity of each requirement. As to the affidavit requirement, the Court, speaking through Mr. Justice Clark, said (341 U. S. 720):

> "1. The affidavit raises the issue whether the City of Los Angeles is constitutionally forbidden to require that its employees disclose their past or present membership in the Communist Party or the Communist Political Association. Not before us is the question whether the city may determine that an employee's disclosure of such political affiliation justifies his discharge.
>
> "We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. *Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust.* Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment. The affidavit requirement is valid." (Emphasis supplied.)

The Brief for Petitioner repeatedly misconstrues the *Garner* decision in stating that it was limited to a requirement of disclosure of only such unlawful associations as were specifically proscribed by legislation at the time the employee was a member and known by him to be subversive.[2] Petitioner confuses the loyalty oath requirement with the affidavit requirement of the Los Angeles ordinance, both of which were before the Court in the *Garner* case. This Court determined that the two provisions of the ordi-

2. Brief for Petitioner, pp. 7, 22-23, 31, 32.

nance merited separate consideration and upheld both on distinct grounds. The ordinance required an affidavit from each employee stating whether or not he had ever been a member of the Communist Party or the Communist Political Association, and the dates of any such association, regardless of when it had occurred and regardless of any knowledge by the employee of the subversive purposes of the organization at the time of any such membership. The ordinance did not provide for the dismissal of an employee who made the disclosure, but it did require the disclosure.

In *Adler v. Board of Education of the City of New York*, 342 U. S. 485 (1952) this Court again stated the right of the State or municipality to inquire into past associations of an employee. Dealing specifically with this power as it affected a public school teacher, and referring to the decision in the *Garner* case, the Court, speaking through Mr. Justice Minton, said, 342 U. S. 493:

> "We adhere to that case. A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state had a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. *One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty.* From time immemorial, one's reputation has been determined in part by the company he keeps. In the employment of offcials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the *fitness* and loyalty of such persons, from considering the organizations and persons with whom they associate." (Emphasis supplied.)

The decision in the *Garner* case was undisturbed by the decisions in *Wieman v. Updegraff*, 344 U. S. 183 (1952) and *Slochower v. Board of Higher Education of New York*, 350 U. S. 551 (1956). In both of these cases this Court was careful to distinguish the decision in the *Garner* case as one upholding the right of the city to inquire of its employees as to matters relevant to their fitness and suitability for the public service.[3]

We submit that this Court's decision in the *Garner* case upholds the right of a public employer to require its employee on pain of dismissal, to answer just such a question or questions as the petitioner refused to answer in the present case.[4]

The *Garner* decision is not impaired by the recent decision of this Court in *Konigsberg v. State Bar of California, et al.*, 353 U. S. (Adv.) 252, 1 L. ed. 2d 810 (1957).

The opinion of the Court in the *Konigsberg* case makes no reference to the *Garner* case. In the *Konigsberg* case, the majority of this Court held that a State could not exclude an applicant from the practice of law by *inferring* that he had failed to prove that he had a good moral character, and did not advocate violent overthrow of the government, under the circumstances there present. The record showed that Konigsberg had unequivocally testified that

3. *Wieman v. Updegraff*, 344 U. S. 183, 188-189; *Slochower v. Board of Higher Education of New York*, 350 U. S. 551, 556.

4. The Superintendent asked only one question of the petitioner in the present case and the petitioner refused to answer this question or questions similar to it (R. 22a). It was, however, a significant and specific question, as to whether in 1944 the petitioner was Press Director of the Professional Section of the Communist Political Association (R. 19a). It was obviously an inquiry directed to a specific time in the past, so that, if the petitioner had answered it in the affirmative, the Superintendent might have made further inquiries as to when, and the circumstances under which, such affiliation had terminated. The testimony makes it clear that similar questions were contemplated as to any further activity after 1944 and would have been asked if the petitioner had not definitely stated that he would not answer "questions of this type." (R. 22a, 44a-45a)

he did not advocate violent overthrow of the government and that he had introduced impressive evidence of his good character by testimony of character witnesses. The Bar Committee nevertheless had inferred that he had not proved his good moral character, based on (1) testimony of a single witness that he had once attended meetings of the Communist Party in 1941 (2) evidence that he had written newspaper articles critical of public officials and their policies, and (3) refusal to answer certain questions as to membership in the Communist Party.

The State Bar Committee had lumped all of these things together in inferring that Konigsberg had not proved good moral character. The majority of this Court held that such an inference could not be drawn. In so holding, the majority opinion specifically stated that the question whether a State could exclude an applicant merely for failing to answer questions was not raised by the record and that the majority did not mean to intimate any view on that problem.[5]

In the present case we are not dealing with an applicant for admission to the Bar, but with a public employee, specifically, a public school teacher, who occupies a sensitive position by reason of association with children in a system of compulsory public education. We are *not* concerned with any *inference of disloyalty* of the teacher, either from his failure to answer the question or from any other evidence. We are *not* concerned with the question of whether the petitioner was or was not a Communist in 1944 or whether he remained one. We are *not* at all concerned with drawing *inferences* from the refusal to answer the Superintendent. We *are* here directly concerned with the question of whether the petitioner can be properly dismissed from his position of public trust, because of his refusal to answer proper questions. The refusal to answer itself has been held to constitute incompetency as a matter of interpretation of a state statute.

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5. 353 U. S. (Adv.) 252, 261-262, 1 L. ed. 2d 819.

Accordingly it is submitted that the *Konigsberg* case is inapplicable.

The petitioner's obligation to answer the questions of the Superintendent were based on his relationship to his superior. It was a duty arising out of his employment in the public school system. Under the State law it was the Superintendent's right and duty to make the inquiry, and the duty of the petitioner to respond. The State law, so interpreted, does not violate the Fourteenth Amendment.

II.

The Conclusion of the Pennsylvania Supreme Court that Refusal to Answer a Proper Question of the Superintendent Constitutes Incompetency Is a Proper Interpretation of a State Statute.

The Supreme Court of Pennsylvania sustained the dismissal of the petitioner for "incompetency," a statutory ground for dismissal under the tenure provisions of the Public School Code of 1949, P. L. 30, § 1122, 24 Purdon's Pa. Stat. Ann. § 11-1122. The Court held that the petitioner's refusal to answer the Superintendent constituted incompetency and that the Board of Public Education was justified in so concluding when it sustained the charges.

Since the Federal Constitution permits the State to require, as a condition of public employment, that a teacher answer such questions relevant to his fitness, the State's determination that his refusal constituted incompetency within the meaning of the State statute presents no federal constitutional question. It is simply a determination that the existing State law imposes this duty on the teacher to respond and renders him subject to dismissal for failure to perform this duty.

The interpretation of the State statute by the State Supreme Court is conclusive. *Barsky v. Board of Regents*, 347 U. S. 442, 448 (1954).

In so holding, the Court acted in accordance with its own precedents as to the meaning of "incompetency," as used in Section 1122 of the Public School Code of 1949. It is not a word of art, but a word with a broad meaning in common and approved usage. The Pennsylvania Supreme Court so held in *Horosko v. Mt. Pleasant Township School District*, 335 Pa. 369, 374-375, 6 A. 2d 866, 868-870 (1939); cert. den. 308 U. S. 553. "Incompetency," as interpreted by the Pennsylvania courts, properly includes any conduct which evidences a lack of fitness or suitability for employment.

The refusal to answer the proper questions of one's administrative superior, directed toward matters relevant to the teacher's qualifications, is a manifestation of lack of fitness for his employment. This is so, not because any inference of misconduct is drawn from the refusal to answer, but because the manifested unwillingness to answer a proper question is the disqualifying fact. We submit that no employer, private or public, is or should be required to retain employees who defy their superiors in the exercise of proper authority and refuse to cooperate in an inquiry which is vital to the ends which their employment is intended to serve.[6]

The petitioner contends that the law is the only measure of his duties. This assumes that a teacher can retain his position as long as he does not commit a crime. It is submitted that this position must be rejected. The State can and does set a standard for teachers that requires more than refraining from crime.

The failure of a teacher to measure up to the standard set by the State is properly held to constitute incompetency. In any event the determination that such conduct constituted incompetency is purely a matter of state law, provided that the Constitution does not forbid the State to require such a standard.

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6. The statement of policy of the Association of American Universities holds, with reference to disclosure of Communist affiliations, that a faculty member owes *complete candor* to his university.

III.

Petitioner's Dismissal for Incompetency Under the Pennsylvania Statute Did Not Deny Him Due Process of Law.

As already noted, the Supreme Court of Pennsylvania has determined that legislative authorization for the dismissal of petitioner existed, as a proper interpretation of the Pennsylvania statute. As it is also demonstrable that the State has the power to dismiss on this ground, the Court's determination that there is statutory authority for the dismissal does not raise any federal constitutional question. It is contended, however, in the Brief for Petitioner that it was "fundamentally unfair" to dismiss him, where there was not a specific statute that expressly declared that the failure of a teacher to respond to such questions should be ground for dismissal.

We suggest that this question is not fairly comprised within petitioner's statement of the "Question Presented" in his Petition for Certiorari [7], and, therefore, is not before the Court under Rule 40(1)(d). It is submitted that in any event, the contention is without merit.

Petitioner cannot complain that he was not warned of the possible consequences of his refusal to answer. The record shows clearly that such warning was given to him by the Superintendent and that he had adequate opportunity to answer the question after the warning was given. The Superintendent of Schools testified (R. 22):

> "I indicated to Mr. Beilan on that occasion that this was a very serious and a very important matter

7. The Petition for Certiorari states the "Question Presented" as follows:

> "Is it a violation of the Due Process Clause of the Fourteenth Amendment for a state to dismiss a public school teacher as 'incompetent' simply because of his refusal in 1953 to answer a question asked by the Superintendent of Schools about his membership in the Communist Political Association in 1944, where such association was lawful at the time it was alleged to exist, and where no hearing on the question of the teacher's loyalty is accorded him."

> and that failure to answer the questions might lead to his dismissal. I wanted to make that clear to Mr. Beilan so that there would be no doubt in his mind as to the importance of this matter as I conceived it; that it wasn't a question of idle curiosity on my part, but that it was a real question of fitness for him to be a teacher or to continue in the teaching work."

It is difficult to see how any warning could be more explicit than this. The fact that the Superintendent told him that his refusal "might" lead to dismissal was certainly as far as the Superintendent could go in giving a warning, since the authority to dismiss resides with the Board of Public Education after a hearing, and the Superintendent has no power of dismissal.

In *Konigsberg v. State Bar of California*, 353 U. S. (Adv.) 252 (1957), this Court expressly refrained from ruling on the question of whether an applicant for admission to the Bar could be excluded on the ground of refusal to answer a question of the Bar Committee. Petitioner cites, however, the following dictum in the majority opinion (353 U. S. 261):

> "Serious questions of elemental fairness would be raised if the Committee had excluded Konigsberg simply because he failed to answer without first explicitly warning him that he could be barred for this reason alone, even though his moral character and loyalty were unimpeachable, and then giving him a chance to reply."

The answer to petitioner's contention is that this dictum is clearly inapplicable to the present case, because the Superintendent did explicitly warn petitioner that failure to answer the questions might lead to his dismissal.

Apart from the fact that petitioner was expressly warned that refusal to answer might lead to dismissal, we submit that it is clearly within the province of a State

Supreme Court to determine that such refusal constitutes incompetency. This Court's decision in *Garner v. Board of Public Works of Los Angeles*, 341 U. S. 716 (1951), declares the right of a public employer to ask such questions and to require the employee to answer. The Supreme Court of Pennsylvania has determined in this case that in Pennsylvania the authority to ask such questions is properly vested in the Superintendent of Schools and that accordingly a teacher is required to answer the Superintendent.

When petitioner contends that express legislative authorization was lacking for such an inquiry by the Superintendent and for dismissal of petitioner for refusal to answer, he is not making a constitutional argument, but is attempting to re-argue the issues of state law which have been decided. For it is the Supreme Court of the State that determines whether there is lawful authorization for the Superintendent's inquiry and whether the dismissal comes within statutory grounds. It is also the Supreme Court of the State that determines the sufficiency of the authorization.

The Supreme Court of Pennsylvania said in the present case (R. 120-121):

> "Certainly a teacher who refuses to respond to a pertinent inquiry relative to his fitness to teach is not competent within the broad reach of that term, whether the inquiry concerns loyalty or any other proper subject of inquiry. Frankness and cooperation with an administrative superior bear directly upon a teacher's competency. They are as essential in one occupying a post of public trust and civic responsibility as academic qualifications. Can it be seriously argued that where the superintendent of schools has trustworthy information indicating that a teacher has an incurable communicable disease or that he is a peddler of narcotics or, as here, that he may entertain Communistic ideologies which could be transmitted to the youth in his care, that no inquiry can be made as to the fact and

that the teacher is not required to respond. As well stated in the brief of counsel for the appellant: "' . . . The State Constitution requires the General Assembly to maintain a thorough and efficient system of public schools. The School Code is the legislative implementation of this Constitutional duty. The rights and duties of a Superintendent have grown with custom and with professional usage. Many of his duties are imposed on him by tradition. It is one of his duties under the School Code to make sure that the teaching staff is competent, and therefore to weed out professionally unfit teachers. This is a continuing process that the Superintendent carries on. The Superintendent has the power and the duty, whenever the facts indicate the need, to inquire into and reevaluate the fitness of a teacher.'. Unquestionably there is a reciprocal duty on the part of the teacher to fully and frankly cooperate. He may not block such proper inquiry by secretiveness or concealment."

The illustrative analogy employed so effectively by the Supreme Court of Pennsylvania, of a situation where the Superintendent has information that a teacher may be engaged in peddling of narcotics, is an apt one. Despite its labored effort to reject the analogy, even the Brief for Petitioner admits that a teacher has a duty to co-operate by answering questions concerning dispensing narcotics to school children, "because it may fairly be said that protection of school children is a part of the job of a school teacher."

This is the precise reason why the Supreme Court of Pennsylvania determined that the teacher has a similar duty to respond to the Superintendent's inquiry about a former Communist association. A more explicit statute is not required in this case, as it would not be needed to require the teacher's co-operation in a narcotics investigation.

The fact that a past association may have been innocent and lawful is not a material distinction. A past asso-

ciation with narcotics peddlers might have an equally innocent explanation. The point is that the State law properly requires an answer and does not permit the teacher to thwart the inquiry by refusing to give one.

Nor is it a material distinction that narcotics peddling may be even more heinous than Communism. It has been held that school children are entitled to be protected from subversive influence. Accordingly, inquiry directed to determine whether it exists, by inquiring first whether such association previously existed, is a proper, lawful inquiry.

There is nothing ex post facto or retroactive in such a decision by the highest Court of a State. This is the ordinary process of judicial interpretation. It is the function of the State Supreme Court to interpret statutes, and when it does so, it declares the existing law as applying to the conduct of the parties at the time it occurred.

In 1937 the statute was first enacted in Pennsylvania, specifying the grounds on which a teacher may be dismissed: "immorality, incompetency, intemperance, cruelty, persistent negligence, mental derangement, persistent and wilful violation of the school laws." From that date the Supreme Court and the other courts of Pennsylvania have frequently been called upon to interpret the general language of the statute, for application of "incompetency" and the other terms to various types of conduct on appeals from dismissals.

For example, the conduct of a woman teacher in working in her husband's beer garden, taking a drink of beer, shaking dice with customers and showing them how to play a pinball machine, although not illegal, was held to constitute "incompetency" in a teacher, even though it deprived her of some of the freedom of action enjoyed by persons in other vocations.[8]

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8. *Horosko v. School District of Mt. Pleasant Township*, 335 Pa. 369, 6 A. 2d 866 (1939), cert. den. 308 U. S. 553. See also: *Appeal of School District of City of Bethlehem*, 347 Pa. 418, 32 A. 2d 565 (1943), cert. den. 320 U. S. 782.

To reach such conclusions, the Court was simply exercising its function of judicially defining the word "incompetency" and applying it to the facts before it.

A civil service statute in Pennsylvania made "conduct unbecoming an officer" a ground for discharging a policeman. The Supreme Court of Pennsylvania held that the refusal of a police captain to answer questions before a grand jury and to explain the source of certain moneys he had received was properly considered by the civil service commission to be "conduct unbecoming an officer." Dismissal on this general ground was upheld.[9]

We submit that it is plain common sense that a teacher knows, when he is required to attend a professional interview with his superior, that his wilful refusal to respond to proper questioning may lead to his dismissal. Certainly, the teacher knows that his superior expects a reply. Certainly he must also be presumed to know that he has an obligation to answer any proper questions. He should know that he is required to co-operate in a matter of legitimate concern in the administration of the schools and the selection and screening of teaching personnel. He should also know that questions relating to a possible subversive affilation on his part are matters of legitimate concern.

If he voluntarily takes the position that he will not answer such questions, he has manifested his unfitness to be a teacher. The Supreme Court of Pennsylvania has so decided in this case.

The tenure provisions of the Pennsylvania Public School Code, like other statutes, both federal and state, which specify the grounds on which employees may be discharged, do so in general terms. They do not attempt to delineate all of the different types of conduct which may come within the grounds set forth. Such laws have not been held to raise any constitutional question of due process of law because they are in general terms. Since the Supreme Court of Pennsylvania determined that petitioner's con-

9. *Souder v. City of Philadelphia*, 305 Pa. 1, 156 Atl. 245 (1931).

duct in blocking the inquiry at its outset constituted incompetency, petitioner's dismissal was properly sustained.

It would be neither practicable nor wise to require that a statute specify all of the types of conduct which would support a determination of incompetency.

The fact that a state statute is expresed in general terms is not usually regarded as raising a question under the Fourteenth Amendment. The state may properly allow wide latitude to administrative discretion in the application of its statutes.[10]

The particularity required in a criminal statute is not required in other enactments.[11]

The petitioner received a full hearing on the charge of incompetency, with written notice of charges, representation by counsel, with opportunity for cross-examination, presentation of evidence, the privilege of demanding a hearing de novo before the Court of Common Pleas, argument and appeal. The case is therefore entirely different from that of *Slochower v. Board of Higher Education of New York*, 350 U. S. 551, (1956), in which a teacher was summarily dismissed without hearing for refusal to testify before a legislative committee.

It is submitted that the proceeding by which the petitioner was dismissed complied with every requirement of fairness and due process of law.

IV.

The Conclusion of the Supreme Court of Pennsylvania that the Proceeding Under the Public School Code Was Not Forbidden by the Loyalty Act Was a Correct Determination of a Question of State Law.

The Supreme Court of Pennsylvania held that the record in this case clearly shows that the ground for dismissal of petitioner was not disloyalty, that the proceedings before

10. See *Dreyer v. Illinois*, 187 U. S. 71, 83-84 (1902); *Pacific Tel. & Tel. Co. v. Seattle*, 291 U. S. 300, 303-304 (1934).

11. See *Mahler, et al. v. Eby*, 264 U. S. 32, 41 (1924).

the Board of Education were not concerned with the question of any suspected disloyalty, and that the tenure provisions of the Public School Code were applicable. In so holding the Supreme Court was simply interpreting the laws of the State of Pennsylvania in holding that the Loyalty Act did not bar dismissal of a teacher on the ground of incompetency for refusal to answer a pertinent question concerning his past affiliations.

There was no federal constitutional question involved in this determination. The conclusion of the Supreme Court of Pennsylvania was based on its interpretation of "incompetency" as a ground for dismissal under the tenure law. The Court said (R. 119):[12]

> ". . . The Loyalty Act pre-empted the field of dismissal for subversion as therein defined, but other causes of dismissal remained unaffected. Section 15 of the Loyalty Act expressly provides: 'The provisions of this act shall not affect the right to discharge any person for any cause other than those provided for by this act or without cause under existing law . . .' Moreover the Loyalty Act provides neither the procedure nor the substantive law with respect to the duty of a teacher to answer proper questions. The provisions of the School Code do provide the basis for dismissal of a teacher who refuses to answer such questions."

Petitioner argues, however, that he was denied a constitutional right because he was not given a hearing on the issue of loyalty. This was the only question which petitioner presented as the basis for his Petition for Certiorari. As a matter of fact, he was not charged with disloyalty.

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12. The dissenting opinion of Mr. Chief Justice Jones was based on his disagreement with the interpretation of the state statutes and on his opinion that the teacher was really dismissed for disloyalty, and was not based on constitutional grounds (R. 128-137).

The accusation that the petitioner continually makes, both in his Petition for Certiorari and his Brief on the merits, that he was really dismissed because of disloyalty and that the charge of incompetency was merely a convenient expedient to get rid of a suspected subversive, has been considered directly and answered specifically by the Supreme Court of Pennsylvania. That Court rejected the implication of any such lack of good faith on the part of the Board of Education, and concluded that the record "irrefutably demonstrates" that the petitioner "was not dismissed for subversion or for disloyalty but for refusal to answer pertinent questions bearing directly on his fitness as a teacher" (R. 118).

As the Court pointed out, this issue was expressly defined and limited at the outset of the hearing before the Board of Education both by counsel for the Board and by counsel for petitioner who agreed that the issue was not disloyalty (R. 11a-13a, 50a).[13]

In his brief on the merits, petitioner contends that he was dismissed under a "stigma of disloyalty". The Board made no finding carrying any such stigma of disloyalty.

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13. "Counsel for the School Board stated: 'I am not asking this Board in this proceeding or any other proceeding that I know of to pass upon the loyalty or disloyalty of this particular teacher. I am saying that the things which this teacher did in connection with his professional obligations were such as to result in incompetency sufficient to discharge the teacher under the School Code.', and counsel for Mr. Beilan stated: 'Mr. President, if you please, I have no intention of seeing this proceeding become a loyalty hearing. Mr. Rhoads [counsel for the School Board] has stated that it is not. I agree with him completely . . .'. Later in the hearing, counsel for Mr. Beilan also stated: 'We have no intention of making a loyalty proceeding of this hearing. We agree with Mr. Rhoads and Mr. Weinrott [a member of the Board] who stated that the only issue is whether this particular man refused to answer certain particular questions and whether, as a matter of law, that amounts to a ground for dismissal . . .'."

V.

Inaccurate Statements in the Brief for Petitioner.

The Brief for Petitioner contains numerous inaccuracies with respect to the facts of the case, both in its Statement of the Case and its Argument.

A. On page 5, the Brief states that at the hearing counsel for the Board conceded that petitioner's competency as a teacher was not in question (R. 53). On the contrary, the Record shows that counsel never made any concession of "competency". What counsel did state was that petitioner was rated satisfactory insofar as his *classroom performance* was concerned. Competency embraces more than classroom teaching.

B. The same paragraph of petitioner's Brief also states that counsel acknowledged, with respect to the charge of persistent and wilful violation of the school laws, that he "knew of no school law which petitioner could be considered to have violated" (R. 9a). The Record shows that counsel's statement was that he could not point to any specific section of the Public School Code which was violated, but that there was wilful and persistent violation of the School Code in general. We developed this point further in our briefs in the state courts, by showing that the Superintendent had numerous powers and duties implied from a construction of the Public School Code as a whole, and one of these duties was to ascertain the professional fitness of the teaching staff. This imposed a corresponding duty on the teacher to help the Superintendent in his inquiry. Failure on the part of the teacher to do so is wilful and persistent violation of the school laws. We referred to Pennsylvania cases holding that disobedience of orders and regulations constitute wilful violation of the school laws,[14]

14. *Ambridge Borough School District v. Snyder*, 346 Pa. 103, 108, 29 A. 2d 34 (1942); *Ganaposki's* case, 332 Pa. 550, 2 A. 2d 742 (1938).

and supporting the conclusion that it was not necessary for the charges to specify a particular section of the Code.[15]

The Supreme Court of Pennsylvania, holding that the petitioner was incompetent, found it unnecessary to pass on the question of whether petitioner's conduct also constituted persistent and wilful violation of the school laws. Accordingly, the question is not part of this case on the present certiorari. Nevertheless, the petitioner's implication that the Board and its counsel acknowledged that they had no basis for such a charge is so completely misleading that this correct statement is submitted.

C. In footnote number 4 on page 6 of Brief for Petitioner, the petitioner misconstrues the holding of the Supreme Court of Pennsylvania in what is referred to as a "companion case" of *Kaplan v. Philadelphia School District*, 338 Pa. 213, 226; 130 A. 2d 672 (1957), as sustaining both the ground of incompetency and wilful violation of the school laws as basis for suspension without pay. The Brief further refers to the *Kaplan* case in footnote number 42 on page 37, by quoting a part of the Court's opinion in that case out of its context. The *Kaplan* case was a suit for salary during the period of the teacher's suspension from duty until he was dismissed by the Board. The issue of the validity of plaintiff's dismissal was not before the Court. It was assumed by both parties for the purpose of such case that he was properly dismissed.

D. Throughout his Brief the petitioner reiterated that the Board of Public Education really dismissed him because it suspected him of disloyalty. This contention is completely unsupported in the Record *and was rejected by the Pennsylvania Supreme Court.* We have already dealt with this point in a previous section of our Brief.[16]

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15. *Batrus' Appeal*, 148 Pa. Super. 587, 26 A. 2d 121 (1942).
16. *Supra*, p. 23.

E. The statement on page 15 of the Brief that the Board is attempting to sustain a dismissal on an "afterthought" in the charges against petitioner is completely without foundation. The Record shows that the refusal to answer the Superintendent was a major charge against the petitioner from the outset of these proceedings.

F. The statement on page 19 that the interview with the Superintendent resembled "a scene in a police interrogation room" rather than any investigation known to the law is completely without warrant. The Record shows clearly that the interview was conducted on a professional basis with complete fairness to the petitioner.

G. The inference which the petitioner draws from the fact that thirteen months elapsed between the interview with the Superintendent and the bringing of charges against the petitioner (Brief for Petitioner, page 20) is unfounded. The Pennsylvania Supreme Court took notice of the fact that no charges were preferred against petitioner or other teachers until the Superintendent had completed individual interviews with a substantial number of teachers (R. 116-117). The interval merely emphasizes the deliberation that occurred before charges were made. There is no basis for the statement that the Superintendent did not "really" consider the petitioner to be incompetent because of his refusal to answer the questions.

Likewise, the fact that the Superintendent did not notify petitioner's immediate school principal and that petitioner continued to receive ratings of "satisfactory" after the interview is of no significance. His ratings, of course, were made by the immediate principal of the school in which he served. The principal knew nothing of the interviews with the Superintendent. The interviews were conducted in privacy to avoid any unfavorable publicity to the teacher. This was done in an effort to be fair to petitioner until a

policy was determined, and it cannot be made the basis of the inference which the petitioner attempts to draw.

H. Another false premise which permeates the Brief for Petitioner is that this case involves academic freedom and freedom of lawful political association. These questions are in no way involved. The Superintendent's right to make the inquiry is clear under the prior decisions of this Court.[17]

It does not infringe petitioner's academic freedom or freedom of lawful political association to ask him whether he was Press Director of the Professional Section of the Communist Political Association in 1944.

I. The statement on page 39 of the Brief for Petitioner that other teachers who fully answered questions about their association were discharged on the same ground as petitioner is not only irrelevant to this case because it is not part of the Record, but also is false in fact. A number of teachers who were interviewed by the Superintendent and answered his questions were not charged with anything.

J. In the concluding section of the Brief for Petitioner, it is contended that he was deprived of substantial procedural rights under the Loyalty Act. The implication that he was denied such rights in the proceeding under the Public School Code is without basis. In fact the petitioner did receive written charges and notice of hearing, the hearing was private at his request, the evidence introduced was legally competent and petitioner had every opportunity to defend himself, to offer evidence and to cross-examine. He availed himself of these rights. He was accorded judicial review. He had the right of a hearing de novo in the Court of Common Pleas, of which he did not avail himself. He did appeal to the Supreme Court of Pennsylvania.

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17. *Garner v. Board of Public Works of Los Angeles*, 341 U. S. 716 (1951); *Adler v. Board of Education of the City of New York*, 342 U. S. 485 (1952).

CONCLUSION.

For the reasons stated, it is submitted that the judgment of the Supreme Court of Pennsylvania should be affirmed.

Respectfully submitted,

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